Filed 10/17/16 Quinn v. Zoo Med Laboratories CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ANDREW QUINN, Plaintiff and Appellant, v. ZOO MED LABORATORIES, INC. et al., Defendants and Respondents.	2d Civil No. B269688 (Super. Ct. No. CV120619) (San Luis Obispo County)

Andrew Quinn appeals from the judgment confirming an arbitration award in favor of respondents Zoo Med Laboratories, Inc. (Zoo Med), and its Chief Financial Officer, Ken Fontes. Appellant is a former employee of Zoo Med. He contends that, because the arbitration agreement is unconscionable, the trial court erroneously granted respondents' petition to compel arbitration. In addition, he argues that the court abused its discretion in granting respondents' motion for relief from their late filing of opposition to his petition to vacate the arbitration award. Finally, appellant maintains that the trial court erroneously denied his petition to vacate the award because the arbitrator had failed to disclose her prior relationships with respondents' counsel. We affirm.

Procedural Background

In October 2012 appellant filed a complaint alleging six causes of action related to his prior employment by Zoo Med. Respondents petitioned to compel

arbitration pursuant to an agreement that appellant had signed when he was hired by Zoo Med.

Over appellant's opposition, the trial court granted the petition. In June 2014 the arbitrator, Deborah C. Saxe, decided that appellant "shall take nothing on any of his claims." On September 26, 2014, appellant filed a petition to vacate the award because Saxe had "failed to make numerous required disclosures." On October 3, 2014, appellant mailed the petition to respondents by overnight delivery. Saxe filed a declaration responding to the petition. On November 19, 2014, 47 days after the petition had been mailed to them, respondents filed opposition to the petition. On December 4, 2014, appellant moved to strike respondents' opposition because it had not been timely filed. Code of Civil Procedure section 1290.6 provides, "A response shall be served and filed within 10 days after service of the petition . . . ."[1]

On January 7, 2015, respondents moved for relief from the late filing pursuant to section 473, subdivision (b). Respondents stated, "This motion is made on the ground that Counsel . . . filed an untimely response . . . as a result of mistake, inadvertence or neglect." The parties agree that the trial court granted the motion, but they do not provide a record citation to the trial court's ruling. We have searched the record and have been unable to find the ruling. The trial court denied appellant's petition to vacate the arbitration award. In November 2015 the court confirmed the arbitration award and entered judgment in favor of respondents.

The Arbitration Agreement

The arbitration agreement provides in relevant part: "[Y]ou and Zoo Med . . . agree that any and all claims arising out of or related to your employment that could be filed in a court of law, including but not limited to, claims of unlawful harassment or discrimination, wrongful demotion, defamation, wrongful discharge, breach of contract or invasion of privacy, shall be submitted to final and binding arbitration, and not to any other forum." "[N]othing in this agreement will affect

[1] Unless otherwise stated, all statutory references are to the Code of Civil Procedure.

National Labor Relations Board, Workers' Compensation Appeals Board, Unemployment Insurance Appeals Board, Department of Fair Employment and Housing or Equal Employment Opportunity Commission proceedings, petitions for judicial review of a decision issued after an administrative hearing or the ability of either party to seek injunctive relief in an appropriate court of law."

Order Compelling Arbitration

Appellant contends that the trial court erroneously compelled arbitration because the arbitration agreement is unconscionable. Civil Code section 1670.5, subdivision (a) provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." "'Unconscionability requires a showing of both procedural unconscionability and substantive unconscionability. [Citations.] Both components must be present, but not in the same degree; by the use of a sliding scale, a greater showing of procedural or substantive unconscionability will require less of a showing of the other to invalidate the claim.' [Citation.]" (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1124.) The doctrine of unconscionability applies to arbitration agreements. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 242.)

"Procedural unconscionability focuses on oppression or unfair surprise; substantive unconscionability focuses on overly harsh or one-sided terms. [Citation.]" (*Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 980.) "'"The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, '"which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."'"' [Citation.]" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133.)

"Where the relevant extrinsic evidence is undisputed, as it appears to be here, the appellate court reviews the arbitration contract de novo to determine whether it

is legally enforceable. [Citation.]" (*Nelsen v. Legacy Partners Residential, Inc., supra,* 207 Cal.App.4th at p. 1124.) "[A]n appealed judgment is presumed correct, and appellant bears the burden of overcoming the presumption of correctness. [Citation.]" (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649-650.)

The trial court found that the arbitration agreement contained an "element of procedural unconscionability" because "there was no opportunity for negotiation and [appellant] would not have been employed without signing the agreement." The court considered the agreement to be "a contract of adhesion." On the other hand, the court determined that it was not substantively unconscionable and contained "indicia of a fair agreement, including a neutral arbitrator, a written award, a reasonable attorney's fee provision, costs to be borne by the employer, no limitation of remedies, adequate discovery and a modicum of bilaterality." The court concluded that the agreement "does not contain sufficient indicia of procedural and substantive unconscionability to render it unenforceable."

Appellant argues that the arbitration agreement is substantively unconscionable because it "waives [his] rights to appear before the California Labor Commissioner, and the remedies afforded thereby. . . . It is thus an exculpatory contract in violation of California Civil Code section 1668, which states: 'All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another[,] or violation of law, whether willful or negligent, are against the policy of the law.'"

This conclusory argument is forfeited because it is not supported by meaningful legal analysis with citation to pertinent authority. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) The only authority cited is *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 148. There, the appellate court concluded that substantial evidence supported the trial court's ruling that class action waivers in an arbitration agreement "were 'exculpatory clauses' under *Discover Bank* [*v. Superior Court* (2005) 36 Cal.4th 148], and therefore substantively unconscionable. [Citation.]" (*Ibid.*) The arbitration agreement here does not contain a class action waiver. Moreover,

in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 [131 S.Ct. 1740, 179 L.Ed.2d 742], "[t]he high court . . . held that the FAA [Federal Arbitration Act] preempts the unconscionability of class arbitration waivers in consumer contracts, thereby abrogating *Discover Bank.*" (*Sonic-Calabasas A, Inc. v. Moreno*, *supra*, 57 Cal.4th at p. 1137.) *Murphy*, therefore, has been overruled to the extent it concluded that a class action waiver was a substantively unconscionable exculpatory clause. (See *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 366.)[2]

Appellant asserts, "[T]he Arbitration Agreement lacks mutuality because it provides that 'either party [can] seek injunctive relief in an appropriate court of law.'" Appellant relies on *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167. There, the arbitration agreement "specifically exclude[d] 'claims for injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information . . . .' Thus the agreement exempt[ed] from arbitration the claims [that the employer was] most likely to bring against its employees." (*Id.*, at p. 176.) The *Mercuro* court concluded that this lack of mutuality made the agreement substantively unconscionable.

In contrast to *Mercuro*, the arbitration agreement here exempts any claim for injunctive relief, not just the claims that Zoo Med is likely to bring against its employees. The agreement, therefore, is not unconscionable for lack of mutuality. (See *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 101 [arbitration agreement's exemption of all injunctive relief claims was not unconscionable because,

[2] In his reply brief, appellant attempts to explain why the arbitration agreement is an "exculpatory contract." "The additional argument on this point in [appellant's] reply brief comes too late. [Citation.]" (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80, fn. 7.) "[T]oo late because [respondents] did not have the opportunity to respond." (*Provost v. Regents of Univ. of Cal.* (2011) 201 Cal.App.4th 1289, 1305.) In any event, the additional argument in the reply brief does not contain a single citation to legal authority. (See *City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 681 ["Defendants cite no legal authority in support of the argument that the orders were void, which renders the issues forfeited"].)

unlike *Mercuro*, exemption did not apply only to claims most likely to be brought by employer against employees].)

Finally, appellant maintains that "the Arbitration Agreement is substantively unconscionable because it does not empower the arbitrator to award attorneys' fees to a prevailing party under federal law." The agreement provides, "Costs and attorneys' fees shall be awarded to the prevailing party in accordance with the same legal standards that would apply had the action been filed in the superior court." Appellant reasonably interprets "superior court" as meaning the superior court of the State of California. The agreement is silent with respect to attorneys' fees in federal district court. Appellant claims that this provision "plainly confines the arbitrator[']s award for attorneys' fees to state court actions, thus impermissibly foreclosing the ability of a prevailing party to be awarded attorneys' fees for actions that would have been filed in federal district court." The provision merely requires that, regardless of whether an action would have been filed in state or federal court, the arbitrator must apply state law in awarding attorney fees to the prevailing party.

Appellant cites no authority showing that this requirement is unconscionable. He misinterprets *Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, which he describes as follows: "[S]ubstantive unconscionability found where arbitrator not empowered to award attorneys' fees in accordance with federal law." *Wherry* involved a claim under the California Fair Employment and Housing Act (FEHA, Gov.Code, § 12900 et seq.). The court noted that, under California law, "[i]n a FEHA case, unless it would be unjust, a prevailing plaintiff should recover attorney fees, but a prevailing defendant is awarded fees only if the case was frivolous or filed in bad faith. [Citation.]" (*Id.*, at p. 1249.) The court concluded that the arbitration agreement was unconscionable because, contrary to California FEHA law, it "provide[d] that the prevailing party is entitled to attorney fees, without any limitation for a frivolous action or one brought in bad faith." (*Ibid*.)

Because appellant has failed to show that the arbitration agreement is substantively unconscionable, the arbitrator did not err in compelling arbitration. In

California "'[b]oth procedural unconscionability and substantive unconscionability must be shown'" to establish that a contract is unenforceable. (*Brinkley v. Monterey Financial Services, Inc.* (2015) 242 Cal.App.4th 314, 335, fn. 6.)

Order Granting Relief from Late Filing of
Respondents' Opposition to Petition to Vacate

Appellant argues that the trial court abused its discretion in granting relief under section 473(b) from the late filing of respondents' opposition to appellant's petition to vacate the arbitration award. The alleged abuse of discretion is based on respondents' "fail[ure] to plead, at all, that the mistake or inadvertence was reasonable and excusable." "Section 473, subdivision (b) provides that a 'court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect' provided that relief is sought within a reasonable time . . . . [¶] The provisions of section 473 are to be liberally construed, and policy considerations favor the determination of actions on their merits. [Citation.] . . . [W]e resolve any doubts as to the applicability of section 473 in favor of the party seeking relief. [Citation.]" (*Alliance for Protection of Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25, 30.) """A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse." [Citation.]'" (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 384.)

Respondents' counsel declared that the petition to vacate had "mistakenly and inadvertently [been] entered into [his] office's calendaring system as a motion under . . . section 1005" instead of a petition to vacate an arbitration award under section 1285 et seq. Section 1005, subdivision (b) provides that opposition to a motion must be filed "at least nine court days . . . before the hearing."

The trial court did not abuse its discretion in granting respondents' section 473(b) motion. "Almost a century ago, our Supreme Court found it obvious that entering the wrong date in an attorney's calendar was sufficient to warrant relief under Code of

Civil Procedure section 473. (*Haviland v. Southern Cal. Edison Co.* (1916) 172 Cal. 601, 605 . . . .) The court reasoned as follows: 'It will hardly be claimed that the inadvertent entry of a wrong date in the book or journal in which defendant's attorneys kept a record of the proceedings to be taken by them could not fairly have been held by the trial court to furnish sufficient ground for relief under the remedial provisions of section 473.' [Citation.]" (*Comunidad En Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1133.)

Moreover, in the trial court appellant did not show that the late filing would prejudice him. (See *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343 ["When the moving party promptly seeks relief [under section 473] and there is no prejudice to the opposing party, very slight evidence is required to justify relief"].)

That the trial court acted within its discretion is supported by *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836. There, the appellate court concluded: "Ruiz offered good cause for the [trial] court to consider Ruiz's opposition papers [to a petition to compel arbitration] even though they were untimely filed and served. (§ 1290.6.) Counsel explained the opposition papers were untimely because his law firm treated the petition as a motion rather than a petition. [Citation.]" (*Id.*, at p. 847.) This is exactly what happened in the instant case.

Order Denying Appellant's Petition to Vacate

Appellant asserts: "The trial court erred by denying [his] petition to vacate because the numerous non-disclosures of the relationships between arbitrator Saxe and respondents' counsel's law firm, Littler [Mendelson], create an impression of possible bias." "The statutory scheme, in seeking to ensure that a neutral arbitrator serves as an impartial decision maker, requires the arbitrator to disclose to the parties any grounds for disqualification. Within 10 days of receiving notice of his or her nomination to serve as a neutral arbitrator, the proposed arbitrator is required, generally, to 'disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.' (§ 1281.9, subd. (a).)

. . . If an arbitrator 'failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware,' the trial court must vacate the arbitration award. (§ 1286.2, subd. (a)(6)(A).)" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 381.) The party petitioning to vacate the award is not required to show that the nondisclosure prejudiced him. (*Id*., at p. 383.) Because the material facts here are not in dispute, "[w]hether [Saxe] was required to disclose the [relationships between her and respondents' counsel] is a mixed question of fact and law that should be reviewed de novo." (*Id*., at p. 385.)

"The question is not whether [Saxe] actually was biased or even whether [s]he was likely to be impartial . . . . The question here is how an objective, reasonable person would view [her] ability to be impartial. [Citations.]" (*Haworth v. Superior Court*, *supra*, 50 Cal.4th at pp 385-386.) "'Impartiality' entails the 'absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind.' [Citation.]" (*Id*., at p. 389.)

Appellant claims that Saxe was required to disclose that she had served as co-counsel with Littler Mendelson in an unrelated case (the "*Matz*" case) involving different parties. Saxe declared that in February 2001 she had been retained as lead counsel for the defendant in *Matz*. At that time, the case had been pending in the courts for five years. Littler Mendelson was also counsel of record for the defendant, but Saxe was informed that it "had not been working on the case for some time and would not be working on the case in the future." Littler Mendelson eventually withdrew as counsel of record. Saxe "never met [the two attorneys from Littler Mendelson who had worked on the *Matz* case], never discussed the case with either of them, and never worked with either of them on the *Matz* case." A person aware of these facts could not "reasonably entertain a doubt that [Saxe] would be able to be impartial." (§ 1281.9, subd. (a).) Thus, Saxe was not required to disclose these facts.

Appellant argues that Saxe was also required to disclose that she had served as mediator in the "*Ocab*" case "wherein Littler [Mendelson] lawyers represented Defendant Swift Transportation Co., Inc." Saxe declared that the mediation had occurred

in June 2011. It lasted no more than three hours. Neither she nor her law firm was compensated for her services. Although court records show that Littler Mendelson was one of the attorneys representing the defendant, "no one from Littler Mendelson was involved in the mediation of the *Ocab* case." Saxe's "records show that the Defendant in *Ocab* was represented at the mediation by Ellen Bronchetti of Sheppard Mullin (only) and that is [Saxe's] recollection." A person aware of these facts could not "reasonably entertain a doubt that [Saxe] would be able to be impartial." (§ 1281.9, subd. (a).)

Appellant maintains that Saxe failed to disclose "that she serves and has served . . . alongside, at least, Littler [Mendelson] shareholder Robert F. Millman" on the "2014 Institute for Corporate Counsel [ICC] Advisory Board of the USC Gould School of law." Saxe was not required to disclose this information. She declared: "I have not attended any meeting of the Advisory Board for the 2014 ICC and have never seen Mr. Millman at any ICC or at any meeting of the Advisory Board for any ICC. In fact, I have not seen or spoken to Mr. Millman since approximately 1996."

Appellant alleges that Saxe failed to disclose that she and two Littler Mendelson attorneys "are co-members of . . . Women Lawyers Association of Los Angeles ('WLALA')." But Saxe's American Arbitration Association (AAA) "panel biography that was sent to counsel for the parties on or about June 4, 2013," disclosed her membership. WLALA has approximately 1,200 members, and Saxe never met the two members from Littler Mendelson.

Finally, appellant states that Saxe failed to disclose that she "is listed as a co-author of a CEB [Continuing Education of the Bar] book" along with one current Littler Mendelson shareholder and one former shareholder. But Saxe's AAA panel biography disclosed that she was the author of chapter 6 of the book. Saxe never met or heard of the current Littler Mendelson shareholder who is listed as a co-author of the CEB book.

The trial court therefore did not err in denying appellant's petition to vacate the arbitration award.

Disposition

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Barry T. LaBarbera, Judge

Superior Court County of San Luis Obispo

Longo & Alach, Patrick J. Alach, for Plaintiff and Appellant.

Littler Mendelson, Ryan L. Eddings, Andrew H. Woo, for Defendants and Respondents.